No. 315

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In the United States Court of Appeals for the Sixth Circuit

Civil Action No. 1555

JOHN KASPER, APPELLANT

v.

D. J. BRITTAIN, JR., J. M. BURKHART, W. B. LEWALLEN, SIDNEY DAVIS and WALTER E. FISCHER, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

APPENDIX FOR APPELLEES

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[1-2] APPEARANCES:

For Petitioners (D. J. Brittain, Jr., et al.): Walter E. Fischer, Esq., Leo Grant, Esq., W. B. Lowallen, Esq., Sidney Davis, Esq., Of Counsel.

For Respondents (Frederick John Kasper, et al.): J. Benjamin Simmons, Esq., Roy N. Stansberry, Esq., Herman Parker, Esq., Of Counsel, John C. Crawford, Jr., Esq., United States District Attorney, Amicus Curiae.

This cause came on to be heard before the Honorable Robert L. Taylor, Judge, United States District Court for the Eastern District of Tennessee, Northern Division, without intervention of a jury, on August 30, 31, September 6, 1956, when the following proceedings were had, to-wit:

THE COURT: Any further motions?

MR. SIMMONS: May it please the Court, in the case before the Court today entitled Joheather McSwain, et al, vs. the County Board of Education of Anderson County, Tennessee, et al, Civil Action No. 1555, I am Mr. Simmons, who represents one of the respondents, John Kasper.

[3] A few minutes ago, if the Court please, the respondent, John Kasper, was served with an order of attachment. I have had occasion, here in the last few intervening moments to scan the order of attachment, and it has certain allegations in there of an evidential nature. I feel if the Court please, in view of that fact, I could not adequately represent this respondent if he was placed on trial at this time.

THE COURT: He will not be placed on trial at this time. I will agree with you on that on the contempt proceeding.

MR. SIMMONS: May it please the Court, I would like to have the entire matter go over until tomorrow at this time, if we may, in view of this development.

THE COURT: No, not on the injunction. This injunction requires immediate action. But on the trial of Mr. Kasper, yes, you will be given sufficient time to prepare your answer, if you desire, and time to prepare your defense, when it is reached. I will assure you of that, and I will give your adversary time, for Mr. Kasper and others to

show cause why this temporary restraining order should not be continued in force as a preliminary injunction. They will be heard because of the magnitude of the matters involved.

It has come to the attention of the Court that those peo-[4] ple, in the face of this order, have been marching in front of that school, and this Court is going into that; and going into that now, to find out if this order has been disobeyed, and is going to find out what should be done about it if it has been disobeyed.

Mr. SIMMONS: If your Honor please, I am only asking 24 hours' continuance.

The COURT: And I am granting that on the attachment proceeding, Mr. Simmons, but I am not passing the preliminary injunction hearing. It must be heard.

Mr. SIMMONS: Your Honor, then, is declining to defer the action on the temporary restraining order, but your Honor is taking under advisement, and your Honor will consider our request for a continuance until tomorrow on the order of attachment?

The COURT: You are right, or even until a later date on the attachment.

Mr. SIMMONS: I might say, your Honor, I feel that the issues are so interrelated that a trial of one necessarily involves trial of the other, and that it is a duplicate function for this Court to proceed to hear one when we will later be called upon to present evidence which will be entirely [5] overlapping on these issues.

The COURT: Mr. Simmons, the Court will not try the injunction phase of the lawsuit on its merits at this time; the Court will just make inquiry to find out whether a prima-facie case is made out on the question of issuing the preliminary injunction. That which the Court does here today will not be any more than either to dismiss the temporary restraining order or continue it in effect as a preliminary injunction not later than a ten-day period, at which time I will hear all parties on the merits of the lawsuit; that is to say, whether the preliminary injunction, if any is issued, shall or shall not be made permanent. I

will not try any phase of the case today on the merits, no, sir. You are entitled to time, and you shall have time to present your case.

Mr. SIMMONS: Thank you, your Honor.

May I ask the Court if any testimony will be taken at all today?

The COURT: Yes, sir. Either side may introduce testimony on the charges made in this petition that was filed before me yesterday, and on which I issued a temporary restraining order at 6:07 p. m. I will hear proof as to whether or not that order was improperly granted or, if not improperly granted, whether it served its purpose and should [6] be dismissed or whether the circumstances require that it be kept in force as a preliminary injunction, not later than ten days from now.

In the meantime, I will hear you gentlemen, and set the matter on the merits within that period. As you know, under the statute, these preliminary injunctions only last, unless the parties agree, for ten days. That is the reason it will have to be set, as I see it, on the merits within that period.

Do I make myself clear?

Mr. SIMMONS: Yes, your Honor. Thank you very much.

The COURT: Any other motions, gentlemen?

Mr. SIMMONS: No, your Honor.

Mr. DAVIS: No, your Honor.

The COURT: Mr. Clerk, will you call the case?

The CLERK: Joheather McSwain, et al, vs. County Board of Education of Anderson County, Tennessee, et al, Civil Action No. 1555, Mr. Fischer, Mr. Grant, Mr. Lewallen, Mr. Davis, for the petitioners; Mr. J. Benjamin Simmons, of Washington, D. C., Mr. Roy N. Stansberry, and Mr. Herman Parker, for the respondents; Mr Jolin C. Crawford, Jr., United States District Attorney, Amicus Curiae.

[8] J. M. BURKHARDT, called as a witness by and in behalf of the petitioners, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DAVIS:

Q. State your full name, please.
A. J. M. Burkhardt.
Q. Where do you live, Mr. Burkhardt?
A. 322 Maple Street, Clinton, Tennessee.
Q. Do you occupy an official position in Anderson County?
A. Yes, sir.
Q. What is that position?
A. Member of the County School Board.
Q. How long have you been a member of the Anderson County School Board?
A. Oh, approximately 16 years.
Q. I believe you were one of the original parties to this main lawsuit?
A. Yes, sir, I was.
[9] Q. And you are still at this time a member of the Anderson County Board of Education?
A. Yes, sir, I am.

By Mr. DAVIS:

Q. It is your understanding that as a member of the Anderson County School Board you are under the orders of the District Court to integrate the Clinton High School in Anderson County?
A. Yes, sir, I am.
Q. As a member of the School Board, have you and other members done that?
A. Yes, sir, we have.
Q. Recently, did you take any particular action to that effect?
A. Yes, sir.
It was not entirely clear in some of their minds whether

they had to formally adopt a resolution as to the Board complying with the order. I believe on last Thursday [10] night we met and passed such a resolution.

Q. That was the Anderson County School Board that met?

A. The Anderson School Board, more or less instructing the Clinton High School principal to carry out the Court order.

Q. Who was the principal at the Clinton High School?

A. D. J. Brittain.

Q. He was instructed by the Board to integrate the high school according to the orders of this Court?

A. Yes, sir.

Mr. Simmons: Your Honor, we can stipulate all they [11] are trying to bring out, that he is a member of the Board of Education and in that official capacity he is under the order of this Court.

The Court: That ought to be sufficient.

By Mr. Davis:

Q. Do you know this respondent, John Kasper?

A. I have seen him by that name, yes, sir. I never met the gentleman.

Q. Where did you see him?

A. I saw him in the Trial Justice's Court.

Q. When was that?

A. Monday morning, I believe.

Q. Did you see any demonstrations at the high school on Monday or Tuesday or Wednesday morning of this week?

A. I did on both mornings.

Q. On——.

A. Monday and Tuesday.

Q. Would you describe to the Court what those demonstrations were?

A. Well, milling around, principally. In fact, the demonstrations were scattered pretty well over town and back

to the school and around the school, parading, and automobiles blowing their horns.

Q. Did you see any pickets or signs or placards?

[12] A. Yes, sir. I saw them carrying them around the school, along the street by the school, and up through town.

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[13] D. J. BRITTAIN, JR., called as a witness by and on behalf of the petitioners, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DAVIS:

Q. State your name, please.

A. D. J. Brittain, Jr.

Q. Will you speak just a little louder?

A. I have laryngitis. That is just about as loud as I can talk.

Q. Do you occupy a position in the school system of Anderson County?

A. I do. I am principal of Clinton High School.

Mr. SIMMONS: I didn't hear that.

The COURT: Principal of Clinton High School.

By Mr. DAVIS:

Q. How long have you occupied that position?

By the WITNESS:

A. I am sorry, but I have laryngitis.

Q. How long have you occupied that position?

A. I have been principal of Clinton High School for 12 years.

The COURT: Mr. Simmons, if you have trouble hearing, you may come up closer.

[14] Mr. Marshall, will you move a chair up closer for Mr. Simmons?

The WITNESS: I am sorry, but I just can't do any better.
The COURT: Mr. Simmons, do you want to get closer?
Mr. SIMMONS: I think it would be better.
Mr. DAVIS: I will repeat the question.

By Mr. DAVIS:

Q. How long have you been principal of the Clinton High School?

By the WITNESS:

A. Twelve years.

Q. You are an original party defendant to the original suit filed in this case?

A. Yes, sir. That is correct.

Q. I believe in that lawsuit you were ordered to integrate the Clinton High School?

A. I was.

Q. Did you take steps to do that?

A. I did.

Q. According to that order, you were to integrate beginning with the fall term?

A. That is correct.

Q. What steps were taken to comply with that [15] order?

A. We enrolled Negro students at the same time we enrolled white students in our school.

We had discussed this matter prior in our faculty as to the best way to do it, realizing that we had no other alternative except to disobey your Honor or one other alternative, which has been either for me to resign my job, the other alternative which has been offered to me, but I feel that any man who holds this job is in the same position. It doesn't matter whether it is me or somebody else.

We also had discussions in school for the purpose of indoctrination, allowing both sides to discuss the question, the purpose being that we knew we had to face this problem, and when we did we could face it as intelligently as we could.